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Department of Water Resources

Attorney for 7UD Ranches

**IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcases 41-8C (Taysom),
	)	41-8D (Weston), and
Case No. 29576	)	41-8F (7UD Ranches)
	)	
	)	7UD RANCHES' SUPPLEMENTAL
	)	MEMORANDUM IN SUPPORT OF ITS
	)	MOTION TO ALTER OR AMEND
	)	SPECIAL MASTER REPORT AND
	)	RECOMMENDATION DATED MAY 2,
	)	2005
	)	

COMES NOW, 7UD Ranches, by and through its attorney of record, Scott J. Smith of the firm of Racine Olson Nye Budge & Bailey, Chartered, and submits this Supplemental Memorandum in Support of its Motion to Alter or Amend the Special Master Report and Recommendation dated May 2, 2005.

7UD Ranches filed its Motion to Alter or Amend on or about May 13, 2005. This memorandum supplements the aforementioned motion.

SUPPLEMENTAL ARGUMENT

A. Juan Spillet does not have standing to bring his late filed motion to set aside.

A claimant in the SRBA is one who asserts ownership rights to the use of water within the State of Idaho. I.C. § 42-1401A(1). A party to the SRBA is "any person who is a claimant or

any person who is served or joined." I.C. § 42-1401A(6); Administrative Order 1 (AO1) 2.q. (A party to the adjudication is "[a]ny claimant as defined in I.C. §§ 42-1401A(1) and (6).").

A party to a subcase is "[t]he claimant, any objector or respondent to a water right recommendation, any party to a subcase which has been consolidated with another subcase, any party to the adjudication granted leave to participate in a subcase by the presiding judge or a Special Master, and any party to the adjudication filing a Motion to Alter or Amend the Special Master's Recommendation." AO1 2.p.; *see also* Memorandum Decisions and Order on Motion to Set Aside Partial Decrees, Subcases 55-02373 et al (LU Ranching Decision) at 11-12 (reviewing the opportunities for an SRBA party to participate in an individual subcase at different levels of the proceeding prior to the entry of a partial decree).

Juan Spillet did not participate in the aforementioned subcases prior to the entry of the partial decrees therein. As a result, he is not a legal party to that subcase and does not have standing to file a motion to set aside the partial decrees. Nor can Spillet become a party to the subcases after the partial decrees have been entered due to the strict procedural deadlines imposed in the SRBA.

With regard to the filing of objections to claims, the SRBA District Court has specifically provided that "[a]ny objections which a de minimis claimant or any other claimant may have to any and all claims being adjudicated in this proceeding must be timely raised in this proceeding in accordance with Idaho Code § 42-1412 (Supp. 1988) or be forever barred." Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses, In Re SRBA, Case No. 39576 (Jan. 17, 1989) at 3 (emphasis added). Moreover, the Idaho Supreme Court recognized that "[u]nder AO1 (2)(p), (10) (c, k), (14) and (15), the SRBA subcases have their own discovery schedule, scheduling orders and trial. Thus,

each final decree arising from the subcases is a result of a distinct litigation tract (sic) and distinct decision by the SRBA judge." *LU Ranching Co v. United States*, 67 P.3d 85, 88-89 (2003). Likewise, the Idaho Supreme Court sustained the District Court's denial of leave to file a late response, and stated that "A.O.1 § 4b provides an absolute rule for responses: **'The objection or response must be received by the court by the deadline specified.'**" *State v. United States*, 996 P.2d 806, 809 (2000) (quoting AO1)(emphasis added). With regard to parties attempting to intervene in a subcase after the expiration of the deadline for filing objections, the Idaho Supreme Court recognized:

Given the monumental scope of the SRBA, . . . we agree with the SRBA court that a "generalized interest is insufficient to intervene in a subcase as a matter of right because the requirements for filing timely objections or responses under I.C. § 42-1412 would become meaningless [,] depriving the court and all parties to the SRBA the structure necessary to administer the case."

Id at 811. The SRBA District Court described SRBA procedures as follows:

[A] claim for a water right is filed in accordance with Idaho Code § 42-1409. IDWR then investigates the nature and extent of the claim. I.C. § 42-1410. The director then prepares and files a director's report for the claim. I.C. § 42-1411. The director's report constitutes prima facie evidence of the nature and extent of the claim I.C. 42-1411(4). Either the claimant or any other party to the SRBA can file objections and/or responses to objections to the director's report. I.C. § 42-1412. The objecting party has the burden of going forward with evidence to rebut the director's report as to all issues raised by the objection. I.C. § 42-1411(5).

Director's reports that are uncontested are typically decreed as reported. I.C. § 42-1411(4). Although this is normally what occurs, the SRBA Court retains discretion to apply law to the facts and render its own conclusion regarding uncontested water rights. *State v. United States*, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995). The district court can also delay entry of a partial decree for the uncontested portions of the director's report if the court determines that the unobjected claim may be affected by the outcome of a pending contested matter. I.C. § 42-1412(7). Ultimately, the claim is subject to a final review by the court prior to the entry of the partial decree.

LU Ranching at 11. Thus, even unobjected claims that received partial decrees are the result of a distinct decision by the SRBA court. See Response to United States' Motion for Status Conference and Order on Nez Perce Tribe's Motion to Set Aside All Decisions, Judgments And Orders On Instream Flow Claims Entered In Consolidated Subcase 03-10022 By Judge R. Barry Wood, And Motion To Disqualify Judge Wood, In Re SRBA, Case No. 39576, Consolidated Subcase No. 03-10022 (Mar. 23, 2000) at 16-17 (each subcase is a distinct piece of litigation), at 30 ("Parties to one subcase are not recognized as parties to other subcases absent filing an objection, response or motion to participate. Subcases are not even designated for uncontested claims").

A mere party to the SRBA is a complete stranger to a subcase absent filing of a timely objection to a reported claim, a timely response to an objection, a timely motion to participate, or a timely motion to alter or amend a special master's report and recommendation. See AO1 §§ 4.d.(1) (objections and responses), 10(k) (motion to participate), and 13(a) (motion to alter or amend). In the SRBA, all filed and reported water right claims receive partial decrees that decree the water right as claimed and reported, decree the water right as amended through objection proceedings, or decree the water right as disallowed if the water right is reported as disallowed or disallowed through objection proceedings. Each partial decree is certified as a final judgment under I.R.C.P. 54(b).

The Idaho Rules of Civil Procedure 60(b) state that "the court may relieve **a party** or his legal representative from a final judgment." (Emphasis added). As mentioned above, Juan Spillet is not "a party" to the above-captioned subcases because he neither filed a timely objection, a timely response to an objection, a timely motion to participate in the subcases, or a timely motion to alter or amend a special master's report prior to the entry of the partial decrees.

Because he is not a party to the above-captioned subcases, he does not have standing to pursue a motion to set aside the partial decrees entered in these subcases. It is respectfully requested therefore that the Special Master Report be amended to recommend the denial of Spillet's motion to set aside.

B. Idaho Rule of Civil Procedure 60(b)(5) does not apply because the partial decrees "do not have prospective effect."

Idaho Rules of Civil Procedure are patterned on the Federal Rules. *Curl v. Curl*, 772 P.2d 204, 207 (Idaho 1989). Accordingly, Idaho courts often turn to federal judicial precedent, Wright and Miller's Federal Practice and Procedure, or Moore's Federal Practice to interpret the Idaho Rules of Civil Procedure.

The Idaho Supreme Court has held that a 60(b)(5) motion is not a substitute for a timely appeal. *Bubak v. Evans*, 788 P.2d 1333, 1335 (Idaho 1989). It follows that a 60(b)(5) motion may not be used as a substitute for filing timely objections, responses, motions to participate, or motions to alter or amend.¹ Even if a mere SRBA party had standing to file a 60(b)(5) motion to set aside a partial decree, the judgment is not prospective in nature and cannot be set aside under I.R.C.P. 60(b)(5) because the decree adjudicates all the rights as between all the SRBA parties as of the date of the judgment). *Curl*, 772 P.2d at 209.

¹ It is arguable that the statute requiring filing of objections by a specific date would operate as a time bar to any participation in subcases or water right proceedings. See I.C. § 42-1412 (emphasis added) ("Any Claimant who desires to object to a water right . . . shall file an objection with the district court within the time specified in the notice of filing of the director's report.") See AO1 4.d.(1)(d) (emphasis added) ("The objection or response must be received by the court by the deadline specified."); see *State v. United States*, 996 P.2d at 809 (quoting AO1) ("A.O.1 § 4b provides an absolute rule for responses: 'The objection or response must be received by the court by the deadline specified.'"). Cf. *Hoopes v. Bagley*, 793 P.2d 1263, 1266 (Idaho 1990) ("Rule 60(b)(6) may not be used as an end-run around the time limits of I.A.R. 14.")

Rule 60(b)(5) only applies if a showing is made that the “judgment . . . is no longer equitable that the judgment should have **prospective application**.” (Emphasis added). Rule 60(b)(5) does not apply to judgments that do not have “prospective application.”

A forfeiture provision in a judgment or a judgment that contains an injunction has “prospective application.” *Devine v. Cluff*, 725 P.2d 181, 184 (Idaho Ct. App. 1986). A partial decree for a water right, on the other hand, does not have prospective application.

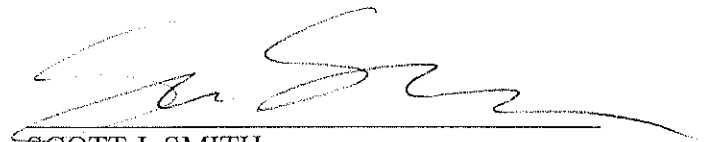
When a partial decree for a water right is filed and entered in the SRBA, it is certified as a final judgment under I.R.C.P. 54(b). As such, the partial decree fully adjudicates a right to real property. See I.C. § 55-101 (water rights are real property). Where, as with partial decrees entered in the SRBA, a judgment awards parties portions of property, and each party goes into possession of the property awarded to them, the judgment awarding the property is not prospective. *Curl*, 772 P.2d at 209; see *Gajewski v. Bratcher*, 240 N.W.2d 871, 891 (N.D. 1976) (judgment that quiets title to land has impact on future dealings with land, but is not judgment having prospective application within the meaning of the term in Rule 60(b)(5)). See also *McBride v. McBride*, 739 P.2d 258, 261 (Idaho 1987) (judgment adjudicating all rights between parties on date of judgment is not prospective, therefore Rule 60(b)(5) is not an available remedy).

Because the partial decrees entered in the above-captioned subcases do not have prospective application, they may not be set aside under Rule 60(b)(5). It is respectfully requested therefore that the Special Master Report be amended to recommend the denial of Spillet’s motion to set aside.

CONCLUSION

It is respectfully requested that the Special Master Report and Recommendation be altered or amended to deny Spillet's motion to set aside the partial decrees in the above-captioned subcases, for the following alternative reasons. First, Spillet's motion to set aside did not refer to Rule 60(b)(5) and therefore that rule should not have been relied upon for the recommendation to set aside the partial decrees. (See Motion to Alter or Amend). Second, the Idaho Supreme Court has held that Rule 60(b)(5) requires a "real and substantial change in circumstances" occurring after the entry of the partial decrees and there has been no evidence or showing of such a change in this case. (See Motion to Alter or Amend). Third, the Order of Reference required an "express" acknowledgment on the part of IDWR that an error was made and IDWR did not expressly acknowledge any error in the Supplemental Director's Report but instead found that it had relied upon the best information available at the time. (See Motion to Alter or Amend). Fourth, Spillet is not a "party" to the above-captioned subcases and therefore lacks standing to pursue his motion to set aside. Fifth, the partial decrees entered in the above-captioned subcases may not be set aside under Rule 60(b)(5) because they do not have prospective application.

DATED this 24 day of May 2005.


SCOTT J. SMITH
Attorney for 7UD Ranches

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of May, 2005, I caused a true, correct and complete copy of the foregoing document to be served by U.S. first-class mail, postage prepaid, upon the following, unless a different method of service is indicated:

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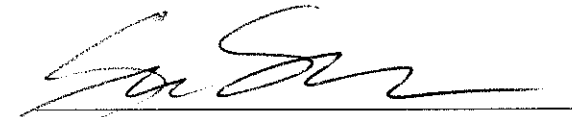
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